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In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

v.

CITY OF ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari
To The Minnesota Supreme Court

BRIEF *AMICUS CURIAE* OF THE NATIONAL BLACK WOMEN'S HEALTH PROJECT IN SUPPORT OF RESPONDENT

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CONSENT OF PARTIES

Letters of petitioner and respondent consenting to the filing of this brief are being filed separately with it.

INTEREST OF *AMICUS*

The National Black Women's Health Project (NBWHP) is a national grassroots self-help and health advocacy organization that is committed to improving the overall health status of Black women. The core program is based on the concept and practice of self-help and inclusion of all African American women, with a special focus on women living on low incomes. Health is not merely the absence of illness, but the active promotion of emotional, mental and physical wellness of present and future generations. Fundamental to this goal is the eradication of racism, sexism, and poverty in society, and with it the dramatically disproportionate health risks and lower life expectancy to which Black families and communities are subjected. National Black Women's Health Project, *Annual Report* 1, 2, 16 (1989).

The NBWHP began in 1981 as a pilot program of the National Women's Health Network, was incorporated as a non-profit organization in 1984, and has become internationally recognized as an advocacy organization by and for Black women. Since its inception, it has grown to more than 150 chapters in 26 states, with over 2,000 members participating, including members in St. Paul. In 1990, its National Public Policy and Education Office in Washington, D.C. was established to provide a national

forum to ensure that the information, data, and perspectives of the NBWHP will have an impact on policy development affecting the health and well-being of African American women.

NBWHP has observed that thousands of African American women experience some form of continuing social and psychological stress due to the combined effects of inequality based on race, sex, and class. This stress is directly related, both as cause and effect, to the staggering and disproportionate degree of illness experienced by African American women. For the estimated 14 million African American women living in the United States, life expectancy is shorter and maternal and infant mortality rates are higher than those of white women. This disparity is manifested not only in those areas considered traditional health concerns of women, such as obstetrics and gynecology, but in a wide array of chronic conditions such as lupus, diabetes, hypertension, cardiovascular disease, and certain cancers, from which African American women are more likely to die than are their white counterparts. Major, Including Black Women, speech at Midwest Academy Citizen Action 1991 Conference, Rebuilding America (July 26-28, 1991) 3-5 (presenting data). The life expectancy in the African American community lags three decades behind that of whites. *Id.* at 3. As workers and heads of households, childbearers and nurturers, African American women and other women of color have borne the brunt of these inequalities. Illness and disease are thus sensitive indicators of social inequality as well as social harms to be rectified.

Racist practices such as crossburnings and other exemplary acts of terrorist bigotry dramatically affect both the material and psychological context within which African American women and their communities exist. Such acts cause tremendous mental and emotional damage, create long-lasting dread and well-founded apprehension for security of the person, and demand a response as a means of attempting to reestablish self-respect and security and ensuring survival. Living in a state of seige is not conducive to health because it limits access to that equality of rights without discrimination which is essential to human flourishing.

SUMMARY OF ARGUMENT

The Minnesota Supreme Court upheld St. Paul Minn. Leg. Code section 292.02 (1990) ("§ 292.02") by authoritatively construing it as limited to "fighting words" under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), thus applying only to expressive conduct which falls outside First Amendment protection. *Matter of Welfare of R.A.V.*, 464 N.W. 2d 507 (Minn. 1991). While accepting this analysis, the National Black Women's Health Project respectfully submits that the ordinance promotes the government's "compelling interest in eradicating discrimination," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1983) (sex discrimination), *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (racial discrimination constitutionally suspect), *Richmond v. J.A. Croson*, 488 U.S. 469, 494 (1989) (same) in a way which outweighs First Amendment interests.

Crossburning, of which defendant R.A.V. is accused, should be recognized as a terrorist hate practice of intimidation and harassment which, contrary to the purposes of the Fourteenth Amendment, works to institutionalize the civil inequality of protected groups. As applied to petitioner and others who engage in related practices, the statute in question does not violate the First Amendment because social inequality, including through expressive conduct, is a harm for which states are entitled leeway in regulation. *New York v. Ferber*, 458 U.S. 747 (1982) (harm to mental and physical health of children used in child pornography justifies its regulation); *Pittsburgh Press Co. v. Pittsburgh Comm'n. on Human Relations*, 413 U.S. 376 (1973) (interest in eradicating sex discrimination outweighs First Amendment interest in sex-segregated advertising); *U.S. v. O'Brien*, 391 U.S. 367, 376-377 (1968) (communicative conduct may be regulated under specific conditions). The goal of eradicating inequality is advanced narrowly, leaving ample room for less coercive and harassing means of expressing the same message.

Applied, as here, to discriminatory expressive action, § 292.02 significantly advances equality and damages freedom of expression virtually not at all. The compelling interest in eradicating discrimination justifies any impact that application of the statute, as narrowed by the Minnesota Supreme Court and justified herein, may have on the expressive freedoms of perpetrators of symbolic acts of bigotry. Because the legitimate reach of § 292.02 dwarfs any arguably impermissible applications, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the ordinance is not unconstitutionally overbroad.

ARGUMENT

I. THE CHALLENGED ORDINANCE PROMOTES THE COMPELLING GOVERNMENTAL INTEREST IN EQUALITY, OUTWEIGHING FIRST AMENDMENT CONCERNS.

A. The Ordinance Prohibits Discriminatory Practices Which Violate And Undermine The Equality Rights Of Target Groups.

On its face, § 292.02 prohibits, with qualifications, the placing of "a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika" on public or private property. The qualifications include a *scienter* requirement ("knows or has reasonable grounds to know"), injurious or dangerous consequences ("arouses anger, alarm, or resentment in others"), and a traditional prohibited basis on "race, color, creed, religion, or gender." This case applies the statute to an incident in which white youths allegedly burned a cross on the lawn of the one African American family in a St. Paul neighborhood. *Matter of Welfare of R.A.V.*, 464 N.W. 2d 507 (Minn. 1991).

The flaming cross is a well-recognized symbol of racial and religious hatred and instrument of persecution and intimidation, historically directed principally against Blacks and Jews. By the 1920's, the Ku Klux Klan – a white supremacist racial hate organization which is secret, violent, authoritarian, xenophobic, and rabidly prejudiced – made it the emblem of its presence and the precursor of arson, firebombing, torture, and lynching. See generally Wade, THE FIERY CROSS (1987); Goldberg, HOODED EMPIRE (1981); Alexander, THE KU KLUX

KLAN IN THE SOUTHWEST (1965); Katz, THE INVISIBLE EMPIRE (1986). One federal district court found that

> . . . . to attain its end, the klan exploits the forces of hate, prejudice, and ignorance. We find that the klan relies on systematic economic coercion, varieties of intimidation, and physical violence in attempting to frustrate the national policy expressed in civil rights legislation. . . . [K]lansmen pledge their first allegiance to their Konstitution and give their first loyalty to a cross in flames. *U.S. v. Original Knights of the Ku Klux Klan,* 250 F. Supp. 330, 334, 335 (E.D. La. 1965).

Crossburning was also directed against Jews by the Nazis in Germany in the 1930s. Wade, 185. Crossburning, coupled with violence, motivated by invidious animus, has continued to the present day, escalating in recent years. *McMullen v. Carson,* 754 F.2d 936, 938 (11th Cir. 1985); *Marshall v. Bramer,* 110 F.R.D. 232, 235-237 (W.D. Ky. 1985) (collecting cases); Padgett, Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies, 75 J. Crim. L. 103 (1984).

Courts have recognized that crossburning threatens violence, *Stevens v. Tillman,* 855 F.2d 394 (7th Cir. 1988), and is a "particularly invidious act when directed against a black American," *U.S. v. Salyer,* 893 F.2d 113, 117 (6th Cir. 1989), one which produces "fear, anxiety, and apprehension for safety" among Black men, *Ford v. Hollowell,* 385 F. Supp. 1392, 1397 (N.D. Miss. 1974). The Eleventh Circuit, in a case involving a conviction for crossburning, recognized that crossburning sought to intimidate a Black family. *U.S. v. Worthy,* 915 F.2d 1514, 1515 (11th Cir. 1990). The Eighth Circuit recently concluded that a "cross burning was an

especially intrusive act which invaded the substantial privacy interests of its victims in an essentially intolerable manner." *U.S. v. Lee,* 935 F.2d 952, 956 (8th Cir. 1991). The Sixth Circuit observed similarly that "a black American would be particularly susceptible to the threat of cross burning because of the historical connotations of violence associated with the act." *Salyer,* 893 F.2d 116. That crossburning is a threatening act on the basis of race is uncontested.

Indeed, there is no doubt in anyone's mind what crossburning connotes, conveys, portends, or does. In *U.S. v. Lee,* Lonetta Miller, a seventy-one year old Black woman testified on cross-examination as follows:

> Q: Could you tell the ladies and gentlemen of the jury what a cross burning means, whether it is in the south or anywhere else?
>
> A: Well it is a form of intimidation; the ku klux klan uses it for threats; promises of violence, and that sort of thing. From what I understand a lot of the cross burnings in the south during the civil rights movement preceded hangings and that sort of thing. 935 F.2d, 956 n.5.

The Eighth Circuit observed there that defendants' crossburning "was tantamount to intimidation by threat of physical violence. It was not mere advocacy, but rather an overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence against black people." 935 F.2d, 956.

All of the cases discussed above involved complaints of crossburning in a context of inequality claims. Crosses have been found burned to intimidate Blacks out of voter registration in a jury selection case, *Ford v. Hollowell,*

385 F. Supp. 1392 (N.D. Miss. 1974); to induce targets to refrain from exercising federally assured rights such as travel, association, and speech under 42 U.S.C. § 1985(3), *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988); and to threaten and intimidate citizens from the free exercise or enjoyment of a civil right under 42 U.S.C. § 241, *U.S. v. Salyer*, 893 F.2d 113 (6th Cir. 1989), *U.S. v. Worthy*, 915 F.2d 1514 (11th Cir. 1990).

Two recent Court of Appeals decisions are particularly apposite to the instant case. In one, the defendant was charged with conspiracy to interfere with housing rights by force or threat of force for burning a cross within sight of an African American family's home. *U.S. v. Lee*, 935 F.2d 952 (8th Cir. 1991) (upholding civil rights claim under 42 U.S.C. § 3631(a) over First Amendment defense). In another, the defendant pled guilty, *inter alia*, to interference with housing rights, stating in the plea agreement that defendants "decided to burn the cross in the victims' yard 'because of the family's race and their presence in the neighborhood . . .' " *U.S. v. Long*, 935 F.2d 1207, 1209 (11th Cir. 1991) (allowing race to be taken into account as a fact in sentencing enhancement).[1]

Existing equality law has long recognized similar practices as violations of civil rights. Title 42 U.S.C. § 1971(b) provides that "no person . . . shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering

[1] Some of these cases, such as *Worthy*, also invoke 18 U.S.C. § 844(h)(1), use of fire in the commission of a federal felony. *See e.g., U.S. v. Gresser*, 935 F.2d 96 (6th Cir. 1991).

with the right of such other person to vote or to vote as he may choose . . . " Where sharecropper-tenants in possession of real estate under contract are threatened, intimidated or coerced by landlords for the purpose of interfering with their rights of franchise, *U.S. v. Bruce*, 353 F.2d 474 (5th Cir. 1965); *U.S. v. Beaty*, 288 F.2d 653 (6th Cir. 1961), burning a cross to attempt to intimidate a person out of their voting rights should clearly be covered as well. Similarly, 42 U.S.C. § 2000b provides for an action for threatened loss of equal access to public facilities, under which burning a cross would obviously be included. Crossburning to exclude from housing rights, as in the case at bar, is covered under 42 U.S.C. Section 3631(a), which prevents intimidation of "any person because of his race, color, religion, sex . . . " from exercising rights to fair housing. *See also* 42 U.S.C. § 3617 (1991).

In upholding Title II of the Civil Rights Act of 1964's equal accommodations provision, this Court emphasized that its "fundamental object . . . was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access . . . " *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 250 (1964). Cowering in terror at night with your family on the floor of your own home in the light of a terrorist cross burning on your lawn is surely a deprivation of personal dignity equal to not being permitted to stay overnight in a motel on the road.

Other civil rights rubrics have long permitted civil actions for conduct covered under § 292.02. Behavior such as hanging a noose over a desk, *Vance v. Southern Bell*, 863 F.2d 1503 (11th Cir. 1989) or in a supply room, *Taylor v. Jones*, 653 F.2d 1196 (8th Cir. 1981), or writing "KKK" on a tool shed in a workplace, *Vaughn v. Pool*

Offshore Co., 683 F.2d 922 (5th Cir. 1982) are legally actionable as discriminatory harassment on the basis of race. Placing pornography in the workplace, arguably a type of conduct based on gender under § 292.02, has been recognized as discriminatory sexual harassment under Title VII. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) (posting sex pictures is sexual harassment over First Amendment defense); *but cf. Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (posting sex pictures is not sexual harassment because pornography is pervasive; no First Amendment defense raised).

Purely verbal harassment is unproblematically actionable as racial or sexual discrimination or both under state and federal human rights laws. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (racial epithets); *Friend v. Leidinger*, 446 F. Supp. 361 (E.D. Va. 1977), *aff'd.*, 588 F.2d 61 (4th Cir. 1978) (racial harassment); *Weiss v. U.S.*, 595 F. Supp. 1052 (E.D. Va. 1984) (anti-Semitic epithets). Examples of sexual harassment include *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bohen v. East Chicago*, 799 F.2d 1180, 1189 (7th Cir. 1986) (Posner, J., concurring) (sexual abuse and vilification); *Hicks v. Gates Rubber*, 928 F.2d 966 (10th Cir. 1991) (racial and sexual harassment); *Continental Can v. State*, 297 N.W.2d 241, 245-246 (Minn. 1980) (defendant "wished slavery days would return so that he could sexually train [plaintiff] and she would be his bitch," in action for sexual harassment under state human rights law).

Discrimination, it should be noted, is typically effectuated through words like "you're fired;" "it was essential that the understudy to my administrative assistant be a man," *Davis v. Passman*, 422 U.S. 228, 230 (1971); and posted signs stating "whites only." *See, e.g., Palmer v. Thompson*, 403 U.S. 217 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Blow v. North Carolina*, 379 U.S. 684 (1965); *Watson v. Memphis*, 373 U.S. 526 (1963); *see also Pierson v. Ray*, 386 U.S. 547 (1967). Other common examples include "did you get any over the weekend?" *Morgan v. Hertz Corp.*, 542 F. Supp. 123, 128 (W.D. Tenn. 1981), "sleep with me and I'll give you an A," *Alexander v. Yale Univ.*, 459 F. Supp. 1, 3-4 (D. Conn. 1977), *aff'd.*, 631 F.2d 178 (2d Cir. 1980), and "walk more femininely, talk more femininely, dress more femininely, wear makeup, have [your] hair styled, and wear jewelry," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). Nearly every time a refusal to hire or promote or accommodate is based on a prohibited group ground, some verbal act either constitutes the discrimination or proves it.

To the knowledge of *amicus*, the First Amendment has been raised as a defense in none of these cases, other than to be rejected in *Robinson* (pornography) and *Lee* (crossburning). Section 292.02 merely covers by express language a small subset of facts that civil rights statutes and rubrics have, without First Amendment controversy, been permitted to cover under far broader prohibitions for decades.

The civil rights approach favors the prohibition of all invidious treatment that has as its consequence "implying inferiority in civil society" for individuals on the basis of their membership in identifiable social groups. *Strauder v.*

West Virginia, 100 U.S. (10 Otto) 303, 308 (1880). In a context of social inequality, the practices prohibited by § 292.02 form integral links in systematic social discrimination. They work to keep target groups in socially isolated, stigmatized, and disadvantaged positions through the promotion of fear, intolerance, segregation, exclusion, disparagement, vilification, degradation, violence, and genocide. The harms range from immediate psychic wounding and attack, Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2365-66 (1989), to well-documented consequent physical aggression. *Increasing Violence Against Minorities: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 124-25 (1980). As terrorist acts of social subordination, they effectuate inequality through coercion, intimidation and harassment.

In this approach, the placing of Nazi swastikas promotes the inequality of Jews on the basis of religion (and creates a false racial identification that has had genocide as its consequence). Crossburnings promote white supremacy – in this case, the inequality of African-Americans to whites – on the basis of race and color. Such symbolic acts of social inequality are thus discriminatory practices, an expressive form inequality takes. In the instant case, the threat, although group-based, was directed against a specific family. Their injuries were not merely subjective, nor can their fears be said to be unfounded. *See e.g. Marshall v. Bramer*, 110 F.R.D. 232 (W.D. Ky. 1985) (Black couple whose home was destroyed by arson after cross burning brings § 1985(3) action against Klan as an organization). The statute's "alarm"

translates into moving out to avoid getting killed; its "anger" and "resentment" could well, in a healthy person, become striking back in self-defense or in defense of one's human dignity. "There is no persuasive reason to wipe the statute from the books, unless we want to encourage victims of such verbal assaults to seek their own private redress." *Gooding v. Wilson*, 405 U.S. 518, 530 (1972) (Burger, J., dissenting).

At minimum, acts such as crossburnings further the social construction of a group as inferior, unequal, and rightly disadvantaged. On a material level, many African Americans were driven out of the South and forced to relocate in places like Minnesota as a result of such acts. Systematic liquidation due to membership in a group, as occurred to Jews and others during the Holocaust, is the ultimate inequality of which acts such as crossburning are an integral part. In the case at bar, the crossburning is an act of exclusion of Black residents from a neighborhood where they have an equality right to live. It is a euphemism to say that this is what such acts communicate when the fact is that this is what they *do*.

B. The Practices Of Inequality Prohibited By § 292.02 Are Not Protected By The First Amendment.

Crossburning is expressive action which promotes racial inequality through its racist message and impact, engendering terror and effectuating segregation. It inflicts its harm through its meaning, as all threats do. Intimidation by threats of physical violence is not protected by the First Amendment. *See, e.g., Watts v. United*

States, 394 U.S. 705, 707 (1969); *U.S. v. Orozco-Santilian,* 903 F.2d 1262, 1265 (9th Cir. 1990). But physical violence does not mark the constitutional line beyond which legislation is impermissible. *U.S. v. Lee,* 935 F.2d 952, 956 (8th Cir. 1991). Where the harm the expression does to the emotional, physical, and mental health of vulnerable groups – groups the state has an interest in protecting – outweighs its expressive value, even pure speech, on balance, can be restricted. *New York v. Ferber,* 458 U.S. 747 (1982). Where the state interest is in eradicating discrimination, and the speech interest is not of the highest order, even written words can be regulated. *Pittsburgh Press v. Pittsburgh Comm'n. on Human Relations,* 413 U.S. 376 (1973). With expressive conduct, a compelling governmental interest, narrowly pursued, can outweigh a First Amendment interest. *U.S. v. O'Brien,* 391 U.S. 367 (1968). Assuming *arguendo* that crossburning, a public show of force, falls within the scope of the First Amendment, under these combined tests, crossburning may readily be prohibited as under § 292.02.

The traditional approach to a statute such as § 292.02 is to construe it as kind of a prohibition on group defamation, as petitioner and his *amici* ACLU *et al.* have done. This fails to recognize the overriding importance of equality interests where the treatment of suspect classes based on race or gender are involved. When abused through speech, the victim's harm – hence the state's interest in regulation – has traditionally been conceived as protection of sensibilities from offense or guarding of emotional tranquility. *Cohen v. California,* 403 U.S. 15 (1971); *Street v. New York,* 394 U.S. 576, 592 (1969). The harm of the type of conduct covered by § 292.02 has

traditionally sounded more in defamation – injury to group reputation – than discrimination – injury to group status and treatment. While defamation recognizes damage, its damage is more ideational and less material than the damage of discrimination, which recognizes the harm of second-class citizenship and inferior social standing with attendant material deprivation of access to resources, voice, and power. Certainly, being treated as a second-class citizen furthers the second-class reputation of the group of which one is a member, even as a demeaned reputation permits and encourages social denigration and exclusion. But equality is an interest of Constitutional dimension; repute, however weighty, is not. The failure to recognize the equality interest at stake in "group libel" statutes, *see e.g. Collin v. Smith,* 578 F.2d 1197, 1199 (7th Cir. 1978) (ordinance prohibiting parade permit for assemblies which, *inter alia,* incite violence, hatred, abuse or hostility "by reason of reference to religious, racial, ethnic, national or regional affiliation") *cert. denied,* 439 U.S. 916 (1978), has trivialized the harm and obscured the state interest, disabling the constitutional defense of such laws against First Amendment attack.

In the civil rights context, it should be noted that segregated lunch counters or toilets or water fountains were not defended because of what they said – that is, as symbolic speech or as expressions of political opinion – although they were arguably both expressive and political. Racial segregation in education was not regarded as protected speech to the extent it required verbal forms, such as laws and directives, to create and sustain it, nor was it legally regarded as actionable defamation against

African Americans, although a substantial part of its harm was the message of inferiority it conveyed, as well as its impact on the self-concept of Black children. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954); *see also* Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke Law Journal 901 (*Brown* may be read as regulating the content of racist speech). Yet the harm of segregation and other racist practices is at least as much what it says as what it does, just as with crossburning, what it says is indistinguishable from what it does.

Where equality interests in regulating speech have been explicitly articulated, overwhelmingly they have prevailed. In *Pittsburgh Press*, because sex-segregated job advertisements "indicat[ed]" sex discrimination in employment, this Court concluded that such speech "signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions." *Pittsburgh Press v. Pittsburgh Comm'n. on Human Relations*, 413 U.S. 376, 389 (1973). A burning cross "signals" just as powerfully that African Americans are not welcome in the neighborhood. *See also Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Hishon v. King & Spalding*, 467 U.S. 69 (1983).

Where the harm of symbolic conduct is real rather than symbolic, the value of the expression should be weighed against the harm done. *New York v. Ferber*, 458 U.S. 757, 763-64 (1982) (harm of child pornography outweighs its expressive value). The value of crossburnings

"is exceedingly modest, if not *de minimus*." 459 U.S. 762. Indeed, its only value lies in the harm it does.[2]

In the civil rights context, courts have increasingly rejected First Amendment protections for racist harassment and intimidation, including through symbolic means. In the *Vietnamese Fishermen's* case, the court enjoined defendants from engaging in acts of violence, intimidation, or harassment under 42 U.S.C. §§ 1981, 1983 and 1985 for symbolic acts including hanging an effigy of a Vietnamese fisherman, walking around with guns, and "burning crosses on property within the geographic area where members of plaintiffs' class live and/or work without the consent of the owner of said property." *Vietnamese Fishermen's Ass'n. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 220 (S. D. Tex. 1982). Similarly, in the *Lac du Flambeau Indians* case, the court, finding a claim under 42 U.S.C. § 1985(3) based on a "campaign driven by racial hostility toward Indians" as evidenced by verbal racial insults, found an injunction against such activities outside First Amendment scope. *Lac du Flambeau Indians v. Stop Treaty Abuse-Wis.*, 759 F. Supp. 1339, 1349, 1353 (W.D. Wis. 1991).

In a related recognition, the Supreme Court of Georgia recently upheld an anti-mask law against a free

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[2] Outside the recognized civil rights context, but invoking similar concerns, Justice Souter, concurring in *Barnes v. Glen Theatres, Inc.*, expressed a similar rationale for upholding a restriction on nude dancing based on its "secondary effects," there, increased prostitution and sexual assault. 111 S.Ct. 2456, 2470. In the instant case, racial exclusion and intimidation is the primary, indeed only, effect of the expression, making its avoidance even weightier.

speech challenge, recognizing that the Klan's practice of wearing masks worked to "intimidate, threaten, or create an environment for impending violence," hence was not protected speech, in a factual context in which the mask-wearing "helped to create a climate of fear that prevented Georgia citizens from exercising their civil rights." *State v. Miller,* 398 S.E.2d 547, 550 (1990). Crossburnings are at least as harassing, intimidating, and obstructive of protected rights.

Conduct that communicates may invoke the First Amendment but is not necessarily protected speech. This Court permits expressive conduct to be regulated more readily than other expression. It looks to see if such regulation "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." *U.S. v. O'Brien,* 391 U.S. 367, 376-377 (1968). *See also Barnes v. Glen Theatre, Inc.,* 111 S.Ct. 2456 (1991) (nude dancing case, reaffirming and adumbrating *O'Brien*). Harm to a state interest does not become protected as speech because it makes a statement in inflicting an injury. As clarified in *Texas v. Johnson,* "a law directed at the communicative nature of the conduct must . . . be justified by the substantial showing of need that the First Amendment requires . . . It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid." *Texas v. Johnson,* 491 U.S. 397, 406-407 (1989) (flag-burning case).

The recent cases on flag-burning found the statutes regulating it impermissible because they lacked a sufficient governmental interest other than that of suppressing a particular form of criticism of the government. The expression of an idea through conduct may not be regulated "simply because society finds the idea itself offensive or disagreeable." *Johnson,* 491 U.S., 414. The Court in *dicta* emphasized the inadequacy of offensiveness as a harm: "[w]e are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets . . . " *U.S. v. Eichman,* 110 S. Ct. 2402, 2410 (1990). Protected groups are not in a position of power comparable to that of the government, and, in reality, nothing is done to the country when its symbol is burned. By contrast, crossburning, if unpunished, is tantamount to racial supremacy and exclusion, like a "white only" sign only nonverbal. Like most acts, crossburning expresses an idea, but unlike other expressions of ideas, it is threatening and coercive conduct on the basis of race. As noted by the Seventh Circuit in *Collin v. Smith,* "It bears noting that we are not viewing here a law which prohibits action designed to impede the equal exercise of guaranteed rights . . . or even a conspiracy to harass or intimidate others and subject them thus to racial or religious hatred . . . If we were, we would have a very different case." 578 F.2d, at 1204, n.13. Creating a First Amendment exception for an injured flag is not the same as recognizing the state interest in protecting from discrimination terrorized and constructively evicted Black citizens awaiting what may well be a firebombing or a lynch mob.

This Court has made clear that, "concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive" must, as a matter of principle, remain disputed in the marketplace of ideas. *Johnson*, 491 U.S., 417. The marketplace of ideas cannot be assumed to be an equal place in a society in which some groups are systematically unequal to others. But this reality need not be confronted here, since the idea of racial equality can remain disputed in St. Paul. The city, through § 292.02, does not enforce its views in a dialogue on racial equality, nor has St. Paul here adopted the instant regulation of crossburning "because of disagreement with the message it conveys." *Community for Creative Non-Violence v. Watt*, 468 U.S. 288, 295 (1984). Rather, this expressive conduct is prohibited because it inflicts inequality through the delivery of its message. As this Court observed in *Jaycees*, upholding an equality claim over a First Amendment association challenge, "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent – wholly apart from the point of view such conduct may transmit . . . Accordingly . . . such practices are entitled to no constitutional protection." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). That the content of the message is politically racist does not, *ipso facto*, make it protected speech. "[I]nvidious private discrimination may be characterized as a form of exercising freedom . . . protected by the First Amendment, but it has never been accorded affirmative constitutional protection." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). This case is not the time to start.

For St. Paul to side with equality as a basis for public policy is not the same as officially imposing a conclusion on a dialogue. A crossburning is not a dialogue, it is a discriminatory act. The state need not remain neutral when racial inequality is practiced, including through expressive conduct. A law against crossburning means only that second-class citizenship may not be imposed in this way. When equality is a constitutional mandate, the idea that some people are inferior to others on the basis of group membership has been authoritatively rejected as the basis for public policy. Practices based on this idea are not insulated from regulation on the ground that the ideas they express cannot be rejected by law, nor are legislative attempts to address such practices invalid because they take a position in favor of human equality.

Burning crosses, placing Nazi swastikas, and posting pornography in workplaces serve none of the purposes for which speech is protected, any more than verbal racial and sexual harassment or "white only" signs do. Free speech is valued because it encourages political dissent, debate, and participation in self-government, Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970), Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948); promotes diversity, tolerance, and self-restraint, Bollinger, THE TOLERANT SOCIETY 9-11 (1986); manages social change and social conflict, Emerson, at 7; advances knowledge and promotes the discovery of truth, Mill, ON LIBERTY 16-52 (A. Castell ed. 1947); and promotes individual self-fulfillment, Baker, Scope of the First Amendment Freedom of Speech, 25 U.C.L.A. L. Rev. 964, 995-996 (1978). The acts prohibited by § 292.02, by contrast, quash dissent by

silencing the voices of disadvantaged groups through terrorism, often insuring that the victims are so intimidated that the most aggressive and coercive verbal attacks upon them never become "fighting words" because they cannot or do not fight back.[3] Such acts also inhibit truth-seeking because they intimidate disadvantaged groups from asserting their truth and their point of view. They undermine social diversity through exclusion and discourage community participation by demeaning the human worth and self-esteem of their targets. If bigots are fulfilled through such acts, it is at the expense of a welcoming and tolerant environment for others.

The hatemongering prohibited by § 292.02 silences the speech of the less powerful as it marginalizes and segregates them. The official imprimatur of approval that would be secured for such conduct by protecting it as expression would do incalculable harm to the "hearts and minds," *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), of its victims, inhibiting progress toward civil equality, and delegitimating the First Amendment.

In prohibiting such practices, the St. Paul ordinance "responds precisely to the substantive problem which legitimately concerns" government and abridges no more freedom of speech than necessary to accomplish that purpose. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Moreover, the provision aims

[3] This is to suggest that the "fighting words" doctrine implicitly assumes an equality of social vulnerability, safety, and state solicitude that cannot be assumed for groups that have historically been the targets of discrimination.

to stop intimidation from protected rights and to advance equality, not to suppress dissident speech. While the content of the message of a burning cross may represent dissent from the national consensus reflected in legal mandates of equality, it offers no dissent from the overwhelming reality of racial inequality that continues to afflict social life. Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987). Cross-burning should not be romanticized as a lonely and unheeded critique of a powerful *status quo*. Its racism entrenches, embodies, and advances society's most repressive and antiegalitarian norms, indefensible in a society that has equality as a constitutional guarantee.

If St. Paul burned a cross at an official ceremony, it would discriminate on the basis of race in violation of the Fourteenth Amendment. The fact the conduct was expressive would be no defense. This would be as virulent and shocking an act "designed to maintain White Supremacy" as has ever been seen. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating antimiscegenation laws). What would be discriminatory for government to do can be recognized as discriminatory in society through legislation. By prohibiting such conduct when it occurs between its citizens, the city acts against socially institutionalized inequality and, indirectly, against the negative group animus that drives it.

Section 292.02 is as much an equality provision as if it were part of the human rights code. Like the provision upheld over First Amendment concerns in *Jaycees*, the ordinance reflects Minnesota's historically "strong commitment to eliminating discrimination and assuring its

citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). Had equality been recognized as the constitutional interest at stake in group defamation, it would have supported Justice Frankfurter's opinion upholding Illinois' statute in *Beauharnais*, not overruled to this day, that "a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits." *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952). It would also support the reservations based on *Beauharnais* expressed by some members of this Court in the *Skokie* case. *Smith v. Collin*, 439 U.S. 916 (1978) (Blackmun, J., with whom White, J., joins, dissenting from denial of *cert.* to resolve possible conflict with *Beauharnais*). See also *R. v. Keegstra*, [1991] 2 W.W.R. 1 (Supreme Court of Canada upholding hate propaganda statute on equality rationale under *Canadian Charter of Rights and Freedoms*). As the Eighth Circuit concluded in an action for a crossburning, "[t]o protect the inhabitants of this nation from such an attack on civil rights does not violate the spirit of the first amendment." *U.S. v. Lee*, 935 F.2d 952, 956 (8th Cir. 1991).

II. AS APPLIED TO DISCRIMINATORY EXPRESSIVE CONDUCT, § 292.02 IS NOT SUBSTANTIALLY OVERBROAD.

First Amendment overbreadth doctrine provides an exception to the rule that a person to whom a statute may constitutionally be applied may not challenge it on grounds that it may conceivably be applied unconstitutionally to others in situations not before the court. The

concern is that a sweeping statute, or one incapable of limitation, can chill much protected expression before it can be stopped. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). As explained in *Broadrick*, the function of this exception,

> a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. 413 U.S., 615.

While the Court may have been thinking of conduct in which the harmful communicative impact is separate from the harm of the conduct as such, the considerations in permitting regulation are no less strong when the two are one, as here. The laws under which crossburning has previously been prohibited as a civil rights violation have long been recognized as valid. Crossburning, while expressive, is less "pure speech" and more conduct than is child pornography. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 n.12 (1985) ("The Court of Appeals erred in holding that the *Broadrick* substantial overbreadth requirement is inapplicable where pure speech rather than conduct is at issue. *Ferber* specifically held to the contrary."). The equality interests in eradicating racial discrimination, of which crossburning and related acts are instances, are "fundamental, overriding." *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 604 (1983) (equality as public policy upheld over free exercise claim). And § 292.02 has already been subjected to a limiting construction by the state court. *Matter of Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

Like the statute in *Ferber*, § 292.02 is "the paradigmatic case of a statute whose legitimate reach dwarfs its arguably impermissible applications," hence is not substantially overbroad. *New York v. Ferber*, 458 U.S. 747, 773. The overwhelming majority of the speech acts covered are already unprotected speech even apart from an equality rationale. There is no right to burn crosses on public property, *Adderley v. State of Florida*, 385 U.S. 39 (1966), or on the private property of another without permission, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). That leaves burning crosses with permission on others' property and on one's own property – a group of instances so small that the overbreadth doctrine, which is "strong medicine," *Broadrick*, 413 U.S. 613, is inappropriate. "The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel." *Ferber*, 458 U.S., 771.

This result is distinguishable from the invalidation on overbreadth grounds of a statute prohibiting "opprobrious words or abusive language" in *Gooding v. Wilson*, although the facts of both cases involve "bullying tactic[s]" *Gooding v. Wilson*, 405 U.S. 518, 535 (Blackmun, J., dissenting) which raise speech concerns. The statute at issue in *Gooding* was directed only to spoken words, not conduct, and, as applied, sought to safeguard the sensibilities of police officers rather than the equality rights of protected groups. Even so, some justices found *Chaplinsky* undermined by that overbreadth invalidation: "If this is what the overbreadth doctrine means, and if this is what it produces, it urgently needs re-examination." 405 U.S.,

537 (Blackmun, J., with whom Burger, C. J., joins, dissenting).

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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